

2015-72065 / Court: 151

CAUSE NO. _____

MAXROY PROPERTY COMPANY and
GREER CAPITAL CORPORATION

Plaintiffs,

VS.

VERMICULITE PRODUCTS, INC. and
S.W. GREER COMPANY, INC.

Defendants.

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

ORIGINAL PETITION

Plaintiffs MAXROY PROPERTY COMPANY and GREER CAPITAL CORPORATION file this Original Petition and would show this Court the following:

A. DISCOVERY CONTROL PLAN

1. Plaintiffs intend that discovery be conducted under Level 2 of Rule 190.3 of the Texas Rules of Civil Procedure.

B. VENUE

2. Venue is proper under section 15.002 of the Texas Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to this action occurred in Harris County, Texas.

C. PARTIES AND JURISDICTION

3. MAXROY PROPERTY COMPANY ("MAXROY") is a Texas corporation whose principal place of business is in Houston, Texas. Formed in 1994, MAXROY is a real estate investment firm that owns 3.95 acres of vacant land located in Houston, Harris County, Texas, and more specifically described as property located between Hurst Street to the north, Toledo Street to the south, Maxroy Street to the west, and 6407 Hurst Street to the east (the "MAXROY PROPERTY").

4. GREER CAPITAL CORPORATION ("GCC") is a Texas corporation whose principal place of business is in Houston, Texas. Formed in 1984, GCC is a real estate investment firm that owns a commercial property located at 3025 Maxroy Street, Houston, Harris County, Texas (the "GCC PROPERTY"). GCC leases certain buildings located on the GCC PROPERTY to Defendants and other buildings located thereon to non-parties to this litigation. GCC also owns other commercial properties located to the east of the GCC PROPERTY that it leases to non-parties.

5. Defendant VERMICULITE PRODUCTS, INC. ("VPI") is a Texas corporation whose principal place of business is in Houston, Texas. VPI has conducted and continues to transact business in Harris County, Texas, and is thus subject to the jurisdiction of this Court. Relevant to the claims herein described, VPI is a tenant of GCC pursuant to a lease agreement dated June 1, 1988, between VPI and James H. Greer (the "VPI LEASE"). GCC became owner of the GCC PROPERTY by way of a 1993 conveyance from James H. Greer, which conveyance was made subject to the VPI LEASE. GCC and VPI renewed the VPI LEASE on February 4, 2002, and more recently effective January 1, 2008. VPI conducts vermiculite manufacturing operations and warehousing of vermiculite products on portions of the GCC PROPERTY

pursuant to the VPI LEASE. Upon information and belief, VPI has conducted vermiculite operations on the GCC PROPERTY going back into the 1940s. In the past, VPI also conducted certain operations on the MAXROY PROPERTY pursuant to a separate lease agreement. VPI is managed by its President, Dana Chamness.

6. Defendant S.W. GREER COMPANY, INC. ("SWGC") is a Texas corporation whose principal place of business is in Houston, Texas. SWGC has conducted and continues to transact business in Harris County, Texas, and is thus subject to the jurisdiction of this Court. Relevant to the claims herein described, SWGC is a tenant of GCC pursuant to a lease agreement dated February 4, 2002, which SWGC and GCC renewed effective January 1, 2008, (the "SWGC LEASE"). SWGC conducts operations on portions of the GCC PROPERTY pursuant to the SWGC LEASE. In the past, SWGC also conducted certain operations on the MAXROY PROPERTY, and continues to use the MAXROY PROPERTY as parking for SWGC-owned trucks. SWGC is managed by its President, Robert Rowe.

7. Jurisdiction is proper in this Court, Plaintiffs' claims being in excess of the minimum jurisdictional limits of the Court. Moreover, as a court of general jurisdiction, this Court has jurisdiction over the claims asserted herein pursuant to Texas Constitution, Article V, §8. All claims and counts asserted herein are brought under the laws and statutes of the State of Texas. No claims asserted herein are intended to address violations (or potential violations) of any federal statute or constitutional provision.

D. FACTS

8. This is a civil action for, among other things, violation of the Texas Solid Waste Disposal Act, trespass, nuisance, and negligence. Through this action, MAXROY and GCC seek recovery for damages caused by asbestos contamination that came from Defendants' operations on the MAXROY PROPERTY and the GCC PROPERTY.

9. The MAXROY PROPERTY and the GCC PROPERTY are located in Houston, Texas, approximately one mile north of Interstate 10 West and less than two miles east of the 610 North Loop. The two properties are located across from one another on Toledo Street. Historically developed around other light industrial properties and older residences, the area surrounding the MAXROY PROPERTY and the GCC PROPERTY has become increasingly attractive for new residential and commercial, urban development because of its proximity to Memorial Park, the Galleria, and downtown Houston.

10. Investigations have shown that, due to the negligent actions and inactions of Defendants, MAXROY and GCC have suffered significant damages that continue to accrue. The purpose of this action is to hold Defendants legally responsible for their asbestos contamination and its consequences to MAXROY and GCC, which includes damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation.

11. The U.S. Environmental Protection Agency ("U.S. EPA") is investigating the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties to assess the presence of dangerously high levels of asbestos in soils and indoor dust pursuant to its authority under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). In written notices issued to the general public and the local community surrounding the MAXROY

PROPERTY and the GCC PROPERTY, U.S. EPA has referred to the asbestos study area as the Vermiculite Products-Cityside Homes Superfund Site.

12. U.S. EPA is authorized pursuant to federal law to remediate asbestos contamination. In the past, U.S. EPA generally remediated properties only where sampling results indicated asbestos present in amounts greater than 1 percent in soils or greater than 0.1 asbestos fibers per cubic centimeter of air. According to the U.S. Government of Accountability Office ("U.S. GAO"), U.S. EPA began cleaning up asbestos contamination from a vermiculite mine owned by W.R. Grace & Co. near Libby, Montana, in 2000, consistent with these cleanup standards. U.S. EPA also began to evaluate and, where asbestos contamination was identified above cleanup standards, remediate sites that received asbestos-contaminated vermiculite ore from the Libby mine.

13. More recently, the Agency for Toxic Substances and Disease Registry ("ATSDR") recommended (i) updating U.S. EPA's sampling and analysis methods for investigating asbestos contamination and (ii) establishing health-based cleanup standards. In response, U.S. EPA completed a toxicity assessment of risks associated with exposure to asbestos.

14. From the assessment, U.S. EPA determined that data from the Libby vermiculite mine showed that soils containing significantly less than 1 percent asbestos—the cleanup standard at most asbestos-contaminated sites—may present an unacceptable risk to human health and the environment, even at very small concentrations, from the release of dangerous air concentrations of asbestos fibers.

15. In response to the results of the toxicity assessment, U.S. EPA began implementing a national re-evaluation of facilities that received vermiculite ore from the Libby mine to assure remediation to health-protective levels.

16. Exposure to elevated levels of asbestos-containing materials is known or suspected to be associated with asbestos-related diseases and conditions such as asbestosis, mesothelioma, lung cancer, and pleural abnormalities.

17. According to the ATSDR, the Libby, Montana community has asbestosis, mesothelioma, and lung cancer mortality rates significantly higher than other mining communities. A recently published study by scientists at the National Institute for Occupational Safety and Health ("NIOSH") reported that asbestosis mortality among workers at the Libby vermiculite mine was 165 times higher than expected. The study also documented a high number of mesothelioma deaths among Libby vermiculite workers.

18. Pursuant to its national re-evaluation effort, U.S. EPA conducted a site investigation on or around the MAXROY PROPERTY and the GCC PROPERTY on December 16, 2013, to assess the potential for exposure to workers and the general public to airborne asbestos fibers from construction activities involving soil disruption. Following the December 2013 visit, U.S. EPA focused its investigative efforts on properties located immediately adjacent to and west of the MAXROY PROPERTY and the GCC PROPERTY. More recently, U.S. EPA has initialized a removal assessment on the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties.

19. After learning of U.S. EPA's investigation activities on their properties, MAXROY and GCC retained environmental consultants to, among other things, conduct an independent environmental assessment of the extent and sources of asbestos contamination on

the MAXROY PROPERTY and the GCC PROPERTY, and to assess the extent of potential offsite impacts from the asbestos contamination.

20. In March 2014, MAXROY and GCC granted U.S. EPA's request to access the MAXROY PROPERTY and the GCC PROPERTY to allow its environmental contractor, Weston Solutions, to conduct additional site investigation activities and sampling. Also in March 2014, U.S. EPA stated in a publicly-available fact sheet for the Vermiculite Products-Cityside Homes Superfund Site that VPI's vermiculite exfoliation and processing operations was an area of focus relating to asbestos in soils. U.S. EPA also noted in the fact sheet that historical records indicate that W.R. Grace shipped more than 213,000 tons of vermiculite ore from the Libby mine for processing at the GCC PROPERTY between January 1967 and November 1986.

21. In addition to its field investigative work at the MAXROY PROPERTY, the GCC PROPERTY, and the surrounding area, U.S. EPA has collected documents from interested parties regarding the processing of vermiculite ore from the Libby mine. U.S. EPA has also held public meetings to inform the community of its investigative and remedial work at the "Vermiculite Products Site."

22. On June 2, 2014, U.S. EPA issued to GCC a request for information pursuant to CERCLA Section 104(e). As part of the information request, U.S. EPA stated that GCC, VPI, and other entities may be liable under Section 107(a) of CERCLA with respect to asbestos contamination on the GCC PROPERTY and other impacted properties in the area, "as a current owner and/or operator of the Vermiculite Products Site." U.S. EPA did not identify MAXROY as potentially liable for the asbestos contamination on the MAXROY PROPERTY, the GCC PROPERTY, or on neighboring properties. On July 31, 2014, GCC produced documents and provided a narrative response to U.S. EPA's information request.

23. In response to a similar information request from U.S. EPA, VPI acknowledged using Libby vermiculite on the GCC PROPERTY and provided the following description of its operations on the GCC PROPERTY: "[R]aw ore was processed through the expanding furnaces at 1,250 degrees; converted to vermiculite aggregate; then used to make insulating concrete, fireproofing, masonry insulation and for horticulture uses." As part of the same response to U.S. EPA, VPI admitted to having been a historic customer to W.R. Grace & Co. and appended a Sales and Licensing Agreement, dated August 1993, which granted VPI rights to use and sale certain vermiculite products licensed by W.R. Grace.

24. From June 10 to 13, 2014, U.S. EPA's environmental contractor, Weston Solutions, collected soil and interior dust samples from the MAXROY PROPERTY, the GCC PROPERTY, and other neighboring properties owned by GCC, and analyzed the samples for asbestos fibers. U.S. EPA provided to GCC, and separately to VPI, a copy of the results of the June 2014 sampling by letter dated July 14, 2014. The results of sampling identified Libby amphibole asbestos in certain soil samples and elevated levels of asbestos in indoor dust samples. In November 2014, U.S. EPA sent to GCC additional maps of asbestos concentrations identified during the June sampling event.

25. On March 3, 2015, U.S. EPA and its environmental contractor again inspected buildings occupied by VPI and SWGC on the GCC PROPERTY. Several VPI representatives, including an industrial-hygiene contractor (Andrew F. Oberta, MPH, CIH, from Environmental Consultancy), participated with U.S. EPA during the inspection.

26. By e-mail dated August 6, 2015, U.S. EPA informed GCC of U.S. EPA's plan to conduct additional soil sampling on certain properties located adjacent to the GCC PROPERTY. Upon information and belief, U.S. EPA's work in the area is ongoing.

27. According to U.S. EPA records, U.S. EPA incurred more than \$1.3 million in response costs through December 31, 2014, from its site investigations, public meetings, environmental sampling, and other response activities relating to the Vermiculite Products-Cityside Homes Superfund Site.

28. In addition to having copies of sample results from U.S. EPA's investigations on and around the GCC PROPERTY, Defendant VPI has conducted its own investigation of the asbestos contamination. Despite having independent proof of asbestos contamination on the GCC PROPERTY, VPI has failed to conduct the necessary remediation. In early 2015, VPI retained an industrial hygienist, Andrew F. Oberta, MPH, CIH, from Environmental Consultancy, to conduct an industrial hygiene evaluation consisting of the collection of air and dust samples from inside the processing building occupied by VPI on the GCC PROPERTY. Mr. Oberta's findings and recommendations from the evaluation are contained in a document entitled "Industrial Hygiene Evaluation of Asbestos and Related Mineral Fibers," dated June 3, 2015. Mr. Oberta's evaluation confirmed the presence of airborne fiber concentrations of Libby Amphiboles in interior dust samples but recommended that VPI not remove dust from surfaces not subject to routine cleaning. Instead, Mr. Oberta recommended that VPI (i) implement an operations and maintenance ("O&M") program to prevent disturbing the dust "to prevent releasing chrysotile fibers" into the ambient air inside the processing building, and (ii) conduct periodic air monitoring to detect any changes to the levels of airborne fibers inside the building.

29. Even if fully implemented, Mr. Oberta's O&M and air monitoring recommendations do not address the asbestos contamination already present on the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties that was caused by Defendants' manufacturing operations.

30. The claims herein contained arise from the fact that Defendants' operations released asbestos contamination into the soil and air at the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties. On numerous occasions, MAXROY and GCC have requested that Defendants remediate the asbestos contamination and abate the associated nuisance caused by the asbestos release. Notwithstanding these requests, the Defendants have failed to perform the level of remediation required by the U.S. EPA and Texas Commission on Environmental Quality ("TCEQ") to achieve site closure. Specifically, Defendants have failed to properly remediate the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties to (i) reduce asbestos concentrations in soils, and (ii) prevent additional offsite exposure to potentially harmful concentrations of airborne asbestos fibers. Defendants have also failed to conduct offsite investigations to disprove or confirm the extent of migration of asbestos contamination to adjacent properties.

31. As a result of Defendants' negligence that caused the release of asbestos contamination, together with Defendants' collective failure to abate the contamination, elevated levels of asbestos are present in soils at the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties. Absent prompt action to abate the source and migration of the contamination, the surrounding area may be at risk of experiencing additional environmental damage.

32. On May 15, 2015, MAXROY informed the TCEQ of its intention to remediate asbestos soil contamination identified on the MAXROY PROPERTY by applying for enrollment in TCEQ's Voluntary Cleanup Program ("VCP"). MAXROY took these measures as a result of Defendants' failure to remediate the asbestos contamination. On June 26, 2015, TCEQ confirmed with MAXROY that the MAXROY PROPERTY was eligible for remediation under

the VCP as VCP No. 2752. As part of the VCP process, MAXROY submitted to TCEQ scope of work documents outlining planned remediation efforts. By letter dated August 6, 2015, the TCEQ provided comments to MAXROY's remediation plan that included, among other things, requirements to conduct additional soil sampling and to complete a groundwater assessment.

33. Releases of asbestos contamination from Defendants' operations occurred in the past, and the potential for future asbestos releases continue to the present day until the existing contamination is fully abated or remediated. Defendants' acts and omissions create a continuing public and private hazard at the MAXROY PROPERTY, the GCC PROPERTY, and the surrounding area by introducing harmful substances into the soil and ambient air. This nuisance affects the health, safety and welfare of a portion of Harris County, including the area in close proximity to the MAXROY PROPERTY and the GCC PROPERTY. The wrongful conduct of Defendants as described herein constitutes a public nuisance.

34. Accordingly, MAXROY and GCC bring this action for legal damages to abate the nuisance caused by Defendants' conduct and to compensate MAXROY and GCC for all damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation

35. As a direct and proximate result of the wrongful acts and omissions by the Defendants in contaminating and then refusing to properly remediate soil at the MAXROY PROPERTY, the GCC PROPERTY and the surrounding area, MAXROY and GCC have suffered and will continue to suffer damages, costs, and expenses including, without limitation, the following:

- a. Damages to the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties owned by GCC that have been ruined, rendered less valuable, or

otherwise adversely affected as a result of the release and continuing presence of asbestos contamination from Defendants' operations and further compounded by Defendants' failure to fulfill their legal obligations to remediate the contamination and forever eliminate all impacts and effects of the contamination;

- b. Damages MAXROY and GCC have incurred or will incur for investigation, testing, and remediation of asbestos contamination on the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties, including but not limited to costs necessarily incurred to hire consultants, engineers, lawyers, etc., and to implement and manage work practice standards required because of Defendants' conduct that caused the contamination;
- c. Economic and other damages, including but not limited to stigma damages, associated with the continuing presence of asbestos contamination in soil at the MAXROY PROPERTY, the GCC PROPERTY, and the surrounding area;
- d. Damages suffered by MAXROY and GCC in the form of inconvenience, annoyance, and discomfort experienced for years as a result of the wrongful actions of Defendants, which harm and significantly interfere with MAXROY and GCC's full use and enjoyment of their properties, result in lost resources, and cause MAXROY and GCC additional costs of maintenance and operation;
- e. Costs incurred, or to be incurred, to abate the nuisance created and maintained by Defendants; and
- f. Punitive and/or exemplary damages

E. COUNT 1 – TEXAS SOLID WASTE DISPOSAL ACT CLAIM

36. The allegations set forth in Paragraphs 1-35 are hereby incorporated by reference as if fully set forth herein.

37. Pursuant to Sections 361.271 and 361.344 of the Texas Health and Safety Code, MAXROY seeks contribution and indemnity from Defendants for the costs incurred in complying with the environmental laws of Texas.

38. Section 361.344 of the Texas Health and Safety Code states that “[a] person who conducts a removal or remedial action that is approved by the commission and is necessary to address a release or threatened release may bring suit in a district court to recover the reasonable

and necessary costs of that action and other costs as the court, in its discretion, considers reasonable.” This section further provides that “the person seeking cost recovery must have made reasonable attempts to notify the person against whom cost recovery is sought: (1) of the existence of the release or threatened release; and (2) that the person seeking cost recovery intended to take steps to eliminate the release or threatened release.”

39. MAXROY has made reasonable attempts to notify Defendants of the existence of the release or threatened release and MAXROY’s intended steps to eliminate the release or threatened release.

40. MAXROY has incurred expenses, and will continue to incur additional and significant expense, to complete the work necessary to abate contamination at the MAXROY PROPERTY and to achieve the goals of the VCP. These planned remedial and removal actions of MAXROY are necessary to address a release of hazardous substances, hazardous waste and/or solid waste. Pursuant to the Texas Solid Waste Disposal Act, MAXROY seeks a finding by the court that the remediation and removal costs to be approved by the TCEQ and other costs and expenses of this action are reasonable and necessary and should be paid by one or more of the Defendants.

F. COUNT 2 – TRESPASS

41. The allegations set forth in Paragraphs 1-40 are hereby incorporated by reference as if fully set forth herein.

42. In addition to the other counts set forth herein, Defendants have committed an actual and knowing trespass onto real property owned by MAXROY and GCC. Defendants’ wrongful conduct was committed intentionally and voluntarily, whether or not Defendants intended or knew of the consequences of their acts at the time they were committed. These

intentional activities have caused, and will continue to cause, an actual physical invasion of and interference with the property interests of MAXROY and GCC, including real property owned, operated, and or maintained by MAXROY and GCC. This actual and physical invasion of and interference with the MAXROY PROPERTY, the GCC PROPERTY, and other GCC-owned property in the area is ongoing and continues to this day.

43. The consequences of Defendants' conduct include, but are not limited to, the presence of elevated concentrations of asbestos in soils caused by Defendants' operations on the MAXROY PROPERTY and the GCC PROPERTY and Defendants' refusal to remediate the contamination. The resulting contamination of soil on MAXROY and GCC's properties has occurred, and continues to exist, without permission, authority, or consent from MAXROY or GCC.

44. Defendants' conduct is a direct and proximate cause of the injuries and damages suffered by MAXROY and GCC, which include damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation.

45. MAXROY and GCC have incurred, and will continue to incur in the future, damages, costs, and expenses as a result of such unauthorized trespass, for which MAXROY and GCC are entitled to receive compensation and reimbursement from Defendants.

G. COUNT 3 – PRIVATE NUISANCE

46. The allegations contained in Paragraphs 1-45 are hereby incorporated by reference as if fully set forth herein.

47. In addition to the other counts set forth herein, Defendants have intentionally and/or negligently acted or failed to act so as to cause the release of hazardous contamination

from Defendants' operations, which has invaded the MAXROY PROPERTY, the GCC PROPERTY, and other GCC-owned properties in the area and substantially interfered with MAXROY and GCC's use of their properties, resulting in inconvenience, annoyance, and discomfort to MAXROY and GCC; loss of use and market value of property owned, operated, or maintained by MAXROY and GCC; increased costs associated with MAXROY and GCC's operations and maintenance; loss of use of MAXROY and GCC's resources; and other injuries.

48. Defendants' conduct is a direct and proximate cause of the injuries and damages suffered by MAXROY and GCC, which include damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation.

49. MAXROY and GCC have incurred, and will continue to incur in the future, damages, costs, and expenses as a result of such private nuisance, for which MAXROY and GCC are entitled to receive compensation and reimbursement from Defendants, jointly and severally.

H. COUNT 4 – NUISANCE PER SE

50. The allegations contained in Paragraphs 1-49 are hereby incorporated by reference as if fully set forth herein.

51. In addition to the other counts set forth herein, Defendants' nuisance described in Count 3 violates sections of the Texas Health and Safety Code, Texas Occupations Code, and the Texas Asbestos Health Protection Rules, which statutes and rules are of the types that impose tort liability. Specifically, Defendants violated Texas Health and Safety Code section 361.501-02, Texas Occupations Code 1954.059, and section 295.69 of the Texas Asbestos Health Protection Rules, which impose a duty to prevent the unauthorized release of asbestos contamination into the environment and are designed to protect a class of persons to which

MAXROY and GCC belong against the type of injury suffered by MAXROY and GCC. Also, Defendants' violation of the statutes was without a legal excuse.

52. Defendants' interference with MAXROY and GCC's interests caused injury to MAXROY and GCC, which resulted in inconvenience, annoyance, and discomfort to MAXROY and GCC; loss of use and market value of property owned, operated, or maintained by MAXROY and GCC; increased costs associated with MAXROY and GCC's operations and maintenance; loss of use of MAXROY and GCC's resources; and other injuries.

53. Defendants' violation of the statutes is a direct and proximate cause of the injuries and damages suffered by MAXROY and GCC, which include damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation.

I. COUNT 5 - PUBLIC NUISANCE

54. The allegations contained in Paragraphs 1-53 are hereby incorporated by reference as if fully set forth herein.

55. In addition to the other counts set forth herein, Defendants' conduct resulted in an unreasonable interference with a right common to the general public. By intentionally and/or negligently acting or failing to act, Defendants released hazardous substances from Defendants' operations into the community as a whole, including special injury or damage to property owned, operated, and maintained by MAXROY and GCC. Such conduct affects a portion of the community, including the area surrounding the MAXROY PROPERTY and the GCC PROPERTY, and constitutes a public nuisance under Texas Health and Safety Code section 361.501-02, Texas Occupations Code 1954.059, and section 295.69 of the Texas Asbestos Health Protection Rules.

56. MAXROY and GCC have authority to pursue this action for abatement of the public nuisance, and assessment of all costs associated therewith, against Defendants jointly and severally.

57. Defendants' conduct is a direct and proximate cause of the injuries and damages suffered by MAXROY and GCC, which include damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation.

58. MAXROY and GCC also seek equitable relief for abatement of the public nuisance.

59. If MAXROY and GCC prevail on Count 5 and the Court enjoins Defendants from continuing to contaminate (or refusing to remediate) soil at the MAXROY PROPERTY, the GCC PROPERTY, and surrounding area, which contamination constitutes a dangerous condition, and is thereby classified by statute as a public nuisance, MAXROY and GCC are entitled to recover reasonable and necessary attorney fees under Texas Health and Safety Code section 343.013(b).

COUNT 6 – NEGLIGENCE

60. The allegations of paragraphs 1-59 are incorporated by reference as if fully set forth herein.

61. In addition to the other counts set forth herein, at all times material to this Petition, Defendants owed MAXROY and GCC a duty to conduct their operations at the MAXROY PROPERTY and the GCC PROPERTY in such a manner as to prevent the release of hazardous materials onto real property owned, operated, or maintained by MAXROY and GCC,

and to avoid other conduct that causes harm to the MAXROY PROPERTY and the GCC PROPERTY or to the public health or environment.

62. Defendants breached this duty by causing asbestos contamination at the MAXROY PROPERTY, the GCC PROPERTY, and adjacent properties, and later failing to properly remediate said contamination.

63. Defendants knew or should have known, and could reasonably foresee, that their activities would result in the contamination of soil in and around the MAXROY PROPERTY and the GCC PROPERTY to the detriment of MAXROY, GCC, and the surrounding area.

64. As a result, Defendants have breached the standard of reasonable care owed to MAXROY and GCC, and as a direct and proximate result of Defendants' negligent acts and omissions, MAXROY and GCC have been injured and damaged, for which MAXROY and GCC seek unliquidated damages within the jurisdictional limits of this Court.

K. COUNT 7 NEGLIGENCE PER SE

65. The allegations of paragraphs 1-64 are incorporated by reference as if fully set forth herein.

66. In addition to the other counts set forth herein, Defendants' negligence described in Count 6 violated sections of the Texas Health and Safety Code, Texas Occupations Code, and the Texas Asbestos Health Protection Rules, which statutes and rules are of the types that impose tort liability. Specifically, Defendants violated Texas Health and Safety Code section 361.501-02, Texas Occupations Code 1954.059, and section 295.69 of the Texas Asbestos Health Protection Rules, which impose a duty to prevent the unauthorized release of asbestos contamination and are designed to protect a class of persons to which MAXROY and GCC

belong against the type of injury suffered by MAXROY and GCC. Also, Defendants' violation of the statutes was without a legal excuse.

67. Defendants' interference with MAXROY and GCC's interests caused injury to MAXROY and GCC, which resulted in inconvenience, annoyance, and discomfort to MAXROY and GCC; loss of use and market value of properties owned, operated, or maintained by MAXROY and GCC; increased costs associated with MAXROY and GCC's operations and maintenance; loss of use of MAXROY and GCC's resources; and other injuries.

68. Defendants' violation of the statutes is a direct and proximate cause of the injuries and damages suffered by MAXROY and GCC which include damage to, and diminution in value of, the MAXROY PROPERTY, the GCC PROPERTY, and adjacent GCC-owned properties; damage to the premises located thereon; and cost of remediation.

L. JURY DEMAND

69. MAXROY and GCC request a trial by jury on all issues so triable.

M. REQUEST FOR DISCLOSURE

70. Under Texas Rule of Civil Procedure 194, MAXROY and GCC request that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

N. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs MAXROY PROPERTY COMPANY and GREER CAPITAL CORPORATION pray for judgment in their favor against Defendants for:

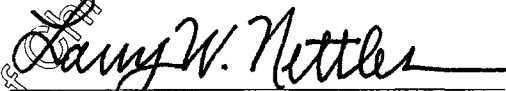
- a. Actual, consequential, and compensatory damages as awarded by the jury;
- b. Exemplary and punitive damages as contemplated by applicable statute;

- c. Equitable relief for abatement of, and/or costs to abate, the public nuisance;
- d. Prejudgment and post-judgment interest as allowed by law;
- e. Costs of suit;
- f. Attorneys' fees allowed by statute for actions seeking recovery for damage to property, as allowed by Texas Health and Safety Code section 343.013(b), and any other legal entitlement; and
- g. All other relief the Court deems appropriate.

DATED: November 30, 2015.

Respectfully submitted,

VINSON & ELKINS L.L.P.



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